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March 19, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-B204
445 12th St., S.W.
Washington, D.C. 20554

RE: EarthLink, Inc. Comments in CS Docket No. 01-7

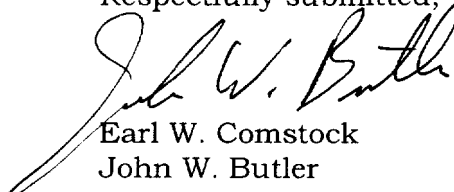
Dear Ms. Salas:

Enclosed are one original and four copies of the Comments of EarthLink, Inc. in the above-referenced matter.

A 3.5 inch diskette will be submitted to Royce Dickens, Cable Service Bureau.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,


Earl W. Comstock
John W. Butler

cc: Royce Dickens, Cable Services Bureau
International Transcription Service

014

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 19 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Nondiscrimination in the Distribution of) CS Docket No. 01-7
Interactive Television Services Over Cable)

COMMENTS OF EARTHLINK, INC.

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March 19, 2001

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**Before the
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Washington, D.C. 20554**

In the Matter of)	
)	CS Docket No. 01-7
Nondiscrimination in the Distribution of)	
Interactive Television Services Over Cable)	

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. ("EarthLink"), by its counsel, hereby submits these comments in response to the Commission's January 18, 2001 *Notice of Inquiry* in CS Docket No. 01-7. EarthLink is the nation's second largest Internet service provider ("ISP") and serves over 4.5 million customers throughout the United States. EarthLink has from its inception received top marks for its quality of service and outstanding customer service. As the largest ISP that is not under current or proposed common ownership with a cable company, EarthLink is particularly interested in the competitive provision of information services, including interactive television services, over cable facilities. Absent Commission action to confirm the application of existing legal requirements to the provision of interactive television services, EarthLink is concerned that discriminatory behavior by cable facility owners could seriously undermine, if not halt entirely, the development of a competitive market for the provision of these services. Further, cable operators could attempt to tie the provision of interactive television services to the use of a particular affiliated ISP, as they have done in the case of cable modem services, to the further detriment of the competitive information services market.

I. THE DEFINITION OF “INTERACTIVE TELEVISION SERVICES.”

The *Notice of Inquiry* defines “interactive television services” as a “service that supports subscriber-initiated choices or actions that are related to one or more video programming streams.”¹ EarthLink supports this definition with one important clarification regarding the subscriber-initiated choices. As defined in the *Notice of Inquiry*, the subscriber-initiated choices could include choosing among options selected by the cable operator and broadcast to all subscribers (for example, among different television camera angles at a football game), or they could involve choosing among options that are “customized” by individual subscribers through the transmission of information of their own choosing (for example, participation in a chat room, purchasing an item through “t-commerce,” or manipulating the video program in an unlimited, individualized fashion).

The first type of subscriber-initiated choice is simply the “selection or use” of an “other programming service,” which is defined in section 602(14) of the Communications Act as “information that the cable operator makes available to all subscribers generally.”² As such, this form of “interactive television service” is more appropriately described as a “cable service” as defined in section 602(6) of the Communications Act.³ As a cable service, the

¹ *In the Matter of Nondiscrimination in the Distribution of Interactive Television Services over Cable*, Notice of Inquiry, CS Docket No. 01-7 at ¶ 6 (released January 18, 2001) (hereinafter “*Notice of Inquiry*”).

² 47 U.S.C. § 522(14).

³ “Cable service” is defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6).

legal regime for the treatment of “other programming services” is already provided in title VI of the Communications Act and the Commission’s regulations implementing that title.

It is the second type of subscriber-initiated choice that is really at issue in the *Notice of Inquiry*. This type of subscriber-initiated choice leads to the activation of an “information service”⁴ or a “telecommunications service,”⁵ both of which are subject to Commission authority under titles I and II of the Communications Act. It is the regulatory classification of “information services” provided over cable facilities about which the Commission has yet to issue clear guidance. EarthLink has commented extensively on this issue in the *Cable Open Access NOI*,⁶ and believes that the Communications Act of 1934,⁷ as amended by the Telecommunications Act of 1996,⁸ is clear that information services offered to the public over cable facilities necessarily involve the offering of a telecommunications service, with the result that the Commission’s long-

⁴ An “information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . .” 47 U.S.C. § 153(20).

⁵ A “telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). “Telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

⁶ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185 (released September 28, 2000) (hereinafter “*Cable Open Access NOI*”).

⁷ Codified generally at 47 U.S.C. § 151 *et seq.*

⁸ Public Law 104-104, which made numerous amendments to the Communications Act, and in particular added the definitions of “information service,” “telecommunications,” and “telecommunications service.”

standing *Computer II* unbundling rules⁹ apply to cable facilities to the extent that such facilities are used for the provision of information services to the public.¹⁰ In light of this analysis, EarthLink believes that prompt resolution of the *Cable Open Access NOI* is a critical first step in establishing the legal regime applicable to interactive television services.

To avoid confusion with respect to the legal regime that applies to the “interactive television services” that are the subject of the *Notice of Inquiry*, EarthLink suggests the Commission clarify the definition of “interactive television services” to mean a “service that supports subscriber-initiated choices or actions, *involving the transmission or manipulation of information controlled by the user*, that are related to one or more video programming streams.”¹¹

By clarifying that the subscriber interaction results in the transmission or manipulation of information controlled by the user (i.e., “of the user’s choosing”¹²), as opposed to the “selection or use” of information controlled by the cable operator, the amended definition properly distinguishes between those interactive services that are “other programming services” offered in conjunction

⁹ *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384, 475 (1980) (hereinafter “*Computer II*”) (requiring all facilities-based common carriers providing enhanced services to offer separately to other enhanced service providers the basic transmission capacity used to transmit those enhanced services).

¹⁰ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Reply Comments of EarthLink, Inc. (filed January 10, 2001) (hereinafter “*Reply Comments of EarthLink in Cable Open Access NOP*”), pages 25-46, for a detailed legal analysis of the Communications Act provisions and Commission precedent regarding application of the *Computer II* rules to cable-based transmission of information services.

¹¹ *Notice of Inquiry* at ¶ 6 (changes to definition proposed by EarthLink shown in italics).

¹² See 47 U.S.C. 153(43) (definition of “telecommunications,” which involves the transmission of information “of the user’s choosing”).

with “video programming,”¹³ both of which are “cable services”¹⁴ governed by title VI of the Communications Act, and “interactive television services” that are subject to both title VI (with respect to “video programming”) and title II (with respect to the “telecommunications service” used to transmit the “information service”). It is to the amended functional definition of “interactive television service” that EarthLink refers in its comments below.

II. THE BUILDING BLOCKS FOR INTERACTIVE TELEVISION SERVICE OUTLINED IN THE NOTICE OF INQUIRY COME UNDER TWO COMPLEMENTARY LEGAL REGIMES.

The *Notice of Inquiry* identifies three “building blocks” necessary for the provision of interactive television services.¹⁵ The three building blocks are:

- 1) the “video stream;”¹⁶
- 2) a “two-way connection;”¹⁷ and
- 3) “specialized customer premises equipment” (also referred to as the “interactive television set-top box” or “ITV-STB”).¹⁸

¹³ The term “video programming” is defined to mean “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(20). For purposes of the *Notice of Inquiry*, the term “video programming stream” is generally used to refer to the “video signal” which subscribers interact with through “ITV enhancements.” *Notice of Inquiry* at ¶ 7.

¹⁴ “Cable service” is defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6).

¹⁵ *Notice of Inquiry* at ¶ 10.

¹⁶ *Id.* at ¶¶ 10 – 11.

¹⁷ *Id.* at ¶ 12.

EarthLink commends the Commission for its clarity in identifying these building blocks, and agrees that these building blocks are each necessary for the provision of interactive television service. The *Notice of Inquiry* asks about the legal regime applicable to these building blocks, and in particular whether the building blocks are “severable” for purposes of establishing the legal and regulatory regime applicable to each.¹⁹ In particular, the *Notice of Inquiry* asks if interactive television services, or the building blocks used for interactive television services, are subject to regulation as:

- 1) “cable services” under title VI of the Communications Act;²⁰
- 2) “telecommunications services” under title II of the Act;²¹
- 3) an “advanced telecommunications capability” under section 706 of the Telecommunications Act of 1996;²²
- 4) “information services” under the Commission’s ancillary authority under title I of the Act;²³ or
- 5) hybrid services subject to multiple provisions of the Act.²⁴

¹⁸ *Id.* at ¶ 13.

¹⁹ *Id.* at ¶ 49.

²⁰ *Id.* at ¶ 45.

²¹ *Id.* at ¶ 46.

²² *Id.* at ¶ 47. Section 706 of the Telecommunications Act of 1996 can be found at 47 U.S.C. § 157 note. “Advanced telecommunications capability” is defined “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” Section 706(c)(1), 47 U.S.C. § 157 note.

²³ *Notice of Inquiry* at ¶ 48.

²⁴ *Id.* at ¶ 49.

The answer is that the building blocks are severable and that each of the building blocks is regulated under a specific title of the Act. Combining the blocks into a single bundled service provided as “interactive television service” to subscribers results in a hybrid service subject to regulation under multiple titles of the Communications Act. However, the fact that the functional definition of “interactive television services” describes a consumer package that is a “hybrid” service does not mean that the regulations governing that service are unclear or need to be created out of whole cloth. In fact, the existing rules and regulations for each individual building block, if applied by the Commission to interactive television services, would address the many of the concerns regarding potential discrimination by cable operators that the Commission correctly identified in the *Notice of Inquiry*.

The Communications Act and Commission precedent interpreting that Act are clear that a single provider may offer to subscribers a bundled package of services even though each separate service may be regulated under separate titles of the Act. As a result, the building blocks may each be subject to regulation under different titles of the Communications Act and still be combined to offer interactive television services to subscribers. The regulatory regimes established by Congress in the different titles of the Communications Act are complementary, and Congress clearly understood that a single provider could simultaneously provide services governed under different titles of the Act.²⁵

²⁵ See, e.g., *City of Dallas, Texas v. Federal Communications Commission*, 165 F.3d 341 (5th Cir. 1999) at 353-354 (“Apparently, then, although Congress was well aware that there are LEC’s that are also cable operators, it nonetheless stated without qualification that LEC’s may provide OVS service. Congress also knew how to distinguish among

EarthLink notes that all of the legal requirements discussed below flow from the Commission's authority under the Communications Act. As the Commission itself has stated, section 706 of the Telecommunications Act is simply a directive to the Commission to use its authority under the Communications Act to encourage the deployment of advanced telecommunications capability, but provides no independent legal authority to do so.²⁶ As a result, section 706 cannot be the basis on which any legal regime with respect to interactive television services or any other service can be constructed. The legal requirements under the Communications Act for each of the building blocks identified by the Commission are discussed below.

A. THE "VIDEO STREAM" BUILDING BLOCK IS A "CABLE SERVICE" UNDER TITLE VI OF THE COMMUNICATIONS ACT.

The *Notice of Inquiry* discusses the "video stream" building block in the context of both "broadcast" and "non-broadcast" video signals, and states that it does not intend the term to mean simply the "primary video" signal of a television broadcast station.²⁷ EarthLink understands from the discussion that the Commission intends the video stream building block to include all video programming and other information that is included in a one-way transmission to the subscriber. In particular, the essential element of this building block is

respective groups of LEC's, and the fact that it did not single out cable operator-LEC's for different treatment . . . indicates that it intended all LEC's to be treated the same.").

²⁶ *In the Matters of Deployment of Wireline Services Offering Advanced Services Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147 at ¶ 77 (released August 7, 1998).

²⁷ *Notice of Inquiry* at ¶ 8.

that it contains the video content with which the interactive television service enhancements are to be synchronized or associated.²⁸ EarthLink agrees that the video content is the essential element of this building block. Absent something with which the other enhancements must be associated, the content of the one-way transmission is irrelevant to the other building blocks.

Assuming that the key characteristic of the video stream building block is that it is a one-way transmission to the subscriber of video programming or other information sent along with the video programming to all subscribers generally, then it is clear that the “video stream” meets the statutory definition of a “cable service.”²⁹ The fact that the cable service may be combined with the other building blocks to make a hybrid service does not change the nature of the underlying cable service.³⁰ Further, treating the video stream as a cable service is consistent with the treatment of broadcast services under the Communications Act, wherein the content provider has the specific right to control the content and to limit the use of its broadcast facility by others.

The structure of the Advanced Television Enhancement Forum’s Enhanced Content Specification³¹ also supports the conclusion that the video stream is a one-way transmission to the subscriber over which the video stream

²⁸ *Id.* at ¶ 11.

²⁹ “Cable service” is defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6).

³⁰ H.R. Rep. No. 98-934 at 44 (1984) (hereinafter “*House Committee Report*”).

³¹ “Enhanced Content Specification”, Advanced Television Enhancement Forum (2000) (hereinafter “*ATVEF Paper*”). The paper is available online at http://www.atvef.com/library/spec1_1a.html and references to pages are to the version viewed at that address on March 18, 2001.

creator has editorial control. The *ATVEF Paper* identifies building blocks that are complementary, but not identical, to those used in the *Notice of Inquiry*, namely, the “content creator” (the person who creates the video stream), the “transport operator” (the person who provides the one-way transport of the video stream and the transmission capacity for any two-way connection), and the “receiver” (the cable or interactive television set-top box).³² The crucial distinction, as discussed further below, is that it is possible as a legal matter for interactive content to be delivered to cable subscribers using ATVEF B triggers as a “cable service” without that service also being an “interactive television service” under the modified definition proposed by EarthLink.³³ This would be the case when there is no two-way connection through which a subscriber-controlled return path can be activated by the trigger.

**1. ATVEF TRIGGERS ARE PART OF THE VIDEO STREAM
AND THE CONTENT PROVIDER HAS EXCLUSIVE
CONTROL OVER THE INCLUSION OF TRIGGERS.**

The Advanced Television Enhancement Forum (ATVEF) specification that has been developed by a “consortium of broadcast and cable networks, consumer electronics companies, television transport operators and technology companies to define a common, worldwide specification for enhanced television programming”³⁴ supports the “one-way broadcast of data. . . .”³⁵ Both types of

³² *Id.* at 3.

³³ *See supra*, note 11.

³⁴ *ATVEF Paper* at 2.

³⁵ *Id.* at 4.

ATVEF “triggers” are included within the “forward path,” i.e. the video stream that is broadcast to all subscribers.³⁶ The ATVEF assumes that when the user tunes to the television (or cable) channel on which the video programming is broadcast, the “receiver locates and delivers broadcast data triggers associated with the TV broadcast.”³⁷

Given that the function of the triggers is to synchronize the offering of an enhancement with the video broadcast, the inclusion of the triggers in the video stream is consistent with the analysis used by the Commission in determining when information is “program-related” for purposes of the Commission’s must carry rules. Under that analysis, the Commission adopted a variation on the court’s three part test in *WGN Continental Broadcasting v. United Video Inc.*,³⁸ namely that the material at issue must be seen by the same viewers that are watching the video programming, must be available during the same time period as the video programming, and must be an integral part of the program.³⁹ Clearly, both the Type A triggers and the Type B triggers meet this test, since their entire purpose would be defeated if they are not seen by the program viewers at the same time as the program, and to do so they must be synchronized as an integral part of the video program itself.

Because they must be synchronized with the video content, EarthLink believes it is sound policy and consistent with the structure of the

³⁶ *Id.* at 10.

³⁷ *Id.* at 11.

³⁸ 693 F.2d 622 (7th Cir. 1982).

³⁹ *In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order, CS Docket No. 98-120 at ¶ 61 (released January 23, 2001).

Communications Act that the video programmer should be afforded exclusive control over whether or not either type of trigger is included in the video content. Absent agreement with the content creator, the Communications Act does not appear to provide any right to force the inclusion of triggers in content created by someone else.

**2. INFORMATION BROADCAST TO ALL SUBSCRIBERS
GENERALLY USING ATVEF B TRIGGERS IS AN “OTHER
PROGRAMMING SERVICE,” WHILE ANY TRIGGER –
ATVEF A OR ATVEF B – THAT ACTIVATES AN
INDIVIDUALIZED TWO-WAY TRANSACTION RESULTS IN
AN “INFORMATION SERVICE.”**

The content that is broadcast to all subscribers in conjunction with the ATVEF B trigger is in fact an “other programming service.”⁴⁰ The content is sent to all subscribers and stored for local use in the receiver (for example the set-top box, a television, or a computer, so long as the device has at least one megabyte of storage available).⁴¹ As the *ATVEF Paper* specifically notes, in the case of ATVEF B triggers a “return path is optional.”⁴² Subscribers can then engage in the “subscriber interaction, if any, necessary for the selection or use of [the] video programming or other programming service”⁴³ stored in the receiver. As a result, in many cases it may be possible for ATVEF B triggers to

⁴⁰ 47 U.S.C. § 522(14).

⁴¹ *ATVEF Paper* at 11.

⁴² *Id.* at 10.

⁴³ 47 U.S.C. § 522(6).

be used to provide an interactive cable service that does not cross the title VI boundary into interactive television service, which has a title II component as well. So long as that interaction does not permit the subscriber to engage in data processing, video conferencing, voice communications, the one-way or two-way broadcast of non-video data and information, electronic mail, shopping, banking, or other services in which the user engages in the transmission or manipulation of information of the user's choosing -- as opposed to information of the content creator's choosing -- the interaction would be included within the definition of cable services.⁴⁴

In contrast to ATVEF B triggers, a two-way connection is always needed in the case of ATVEF A triggers. ATVEF A triggers are used to find and obtain information stored on the Internet. As a result, ATVEF A triggers can be used to direct subscribers to sites that can perform data processing, video or voice communications, email, and other services that exceed the interaction permitted under the definition of cable service. When a return path is present, ATVEF B triggers can also be used to perform non-cable service functions. Basically, whenever a subscriber is able to store, forward, manipulate, or transform individualized information, and transmit that information between or among points of his or her choosing, the service activated by the trigger exceeds the "subscriber interaction" contemplated by the definition of "cable service" and crosses over into the realm of "information services," which are provided "via telecommunications."⁴⁵ If the information service at issue is being offered to the public for a fee, then the underlying telecommunications is also being

⁴⁴ See *House Committee Report* at 43-44.

⁴⁵ 47 U.S.C. § 153(20).

offered to the public for a fee, and the basic transmission service is subject to regulation under title II of the Communications Act.⁴⁶

**B. THE TWO-WAY CONNECTION BUILDING BLOCK IS A
“TELECOMMUNICATIONS SERVICE” WHEN USED TO
TRANSMIT INFORMATION SERVICES.**

When an interactive television enhancement permits a subscriber to engage in “t-commerce” (i.e., to purchase items related to the content displayed by the video stream),⁴⁷ access a chat room, or send an e-mail, that enhancement is providing an “information service.” The statutory language is clear that “information services” are provided “via telecommunications.”⁴⁸ Thus, if an information service is being offered to subscribers generally, as is contemplated in the mass marketing of interactive television services, then it necessarily follows that the underlying telecommunications are being offered to the public for a fee (there is no indication that any party plans to offer interactive television services for free). As noted earlier, “telecommunications” offered to the public for a fee constitutes “telecommunications service,” which the statute directs shall be treated as a common carrier service.⁴⁹

⁴⁶ The offering of telecommunications to the public for a fee constitutes the provision of telecommunications service. 47 U.S.C. § 153(46). Any provider of telecommunications service is a telecommunications carrier. 47 U.S.C. § 153(44). A telecommunications carrier “shall be treated as a common carrier only to the extent that it is engaged in providing telecommunications services.” *Id.*

⁴⁷ *Notice of Inquiry* at ¶ 6.

⁴⁸ 47 U.S.C. § 153(20).

⁴⁹ *See supra*, note 46.

Because the underlying two-way transmission link is a telecommunications service used in the provision of an information service, the cable facility operator must make that transmission link available to other information service providers.⁵⁰ Applying the title II requirements applicable to all facilities-based competitive common carriers will help address some of the valid discriminatory concerns raised by the Commission in the *Notice of Inquiry*.⁵¹ In particular, it is important that the Commission clarify that an unaffiliated information service provider working in conjunction with the video stream provider (the content creator), neither of whom may be affiliated with the cable operator, may use ATVEF A triggers placed in the video stream in conjunction with the two-way telecommunications service to access and download to the interactive television set-top box any information service or content that they agree to provide to the subscriber. In this manner interactive television service providers unaffiliated with the cable operator can compete with a cable operator or its affiliate who uses ATVEF B triggers to transmit content to the subscriber as part of the video stream.

**C. THE INTERACTIVE TELEVISION SERVICES SET-TOP BOX
MUST BE TREATED AS CUSTOMER PREMISES EQUIPMENT
AND NOT A CABLE SET-TOP BOX.**

⁵⁰ *Computer II* at ¶ 231. See also *In the Matter Of Independent Data Communications Manufacturer's Association, Inc., Petition for Declaratory Ruling that AT&T's Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 19 F.C.C. Rcd 13171, 13725 (1995).

⁵¹ *Notice of Inquiry* at ¶ 26.

The interactive television services set-top box (ITV-STB) is the third building block identified by the Commission. It will play a crucial role in the competitive provision of interactive television services. In particular, the ATVEF specification that the receiver (i.e., the ITV-STB) must contain at least one megabyte of information storage illustrates the role it will play in caching information frequently accessed by interactive television service subscribers.⁵² If the cable operator is able to use the set-top box to restrict access to caching for interactive television services, it will provide the cable operator a considerable competitive advantage. The Commission should foreclose this possibility by clarifying that interactive television set-top boxes will be considered customer premises equipment required to be unbundled from the telecommunications building block used to provision the information service enhancements used in interactive television services.⁵³ In addition, the Commission should ensure that cable operators using ATVEF B triggers to provide other programming services must make the set-top boxes used to provide such services compatible with information accessed using ATVEF A triggers whenever that cable operator also provides any information service, whether an interactive television service or an Internet access service, over that cable facility.

⁵² *ATVEF Paper* at 9-10.

⁵³ EarthLink notes that the *Notice of Inquiry* appropriately suggests precisely this result by identifying the third building block as “specialized customer premises equipment” and not a converter box or other equipment specifically identified by Congress in sections 624A and 629 of the Communications Act (47 U.S.C. §§ 544a and 549). *Notice of Inquiry* at ¶ 13.

III. THE COMMISSION MUST CLARIFY THAT CABLE OPERATORS ENGAGED IN THE PROVISION OF INFORMATION SERVICES, INCLUDING THE INFORMATION SERVICES COMPONENTS OF INTERACTIVE TELEVISION SERVICES, ARE TELECOMMUNICATIONS CARRIERS AND MAY NOT DEGRADE THE TRANSMISSION OF SUCH SERVICES OR REQUIRE THE USE OF A PARTICULAR INFORMATION SERVICE PROVIDER TO OBTAIN INTERACTIVE TELEVISION SERVICES.

Consistent with the requirement under the Communications Act and Commission precedent that facilities-based information services providers must make their underlying telecommunications services available on nondiscriminatory terms to other information service providers, EarthLink urges the Commission to address in any rules that it may adopt certain specific discriminatory practices that may arise in conjunction with the provision of interactive television services. Although these potential practices would be prohibited by the general nondiscrimination rule found in title II of the Communications Act,⁵⁴ providers and consumers would benefit from an early and definite application of the nondiscrimination rule to these specific circumstances.

The most fundamental nondiscrimination protection that must be made clear is that neither the cable operator nor any content provider affiliated with such operator (by ownership, contract, or otherwise) may tie its interactive television service offering to the use of a particular information service provider. Thus, when a cable operator delivers service that includes sufficient subscriber-generated interaction to meet the definition of “information services,” the

⁵⁴ 47 U.S.C. § 201.

transmission path for such services must be transparent and agnostic with respect to the information transmitted by the subscriber. This means, for example, that a cable operator may not design its underlying transmission network in such a manner that interactive television service triggers will work, or work well, only with a particular information service provider. More specifically, in the case of triggers that access Internet-based services, it would be impermissible under both the Communications Act and the antitrust laws for a cable operator or its affiliated content provider to require subscribers to switch to or designate an ISP of the operator or provider's choosing in order to obtain interactive television services.

The obvious danger of such a tying mechanism is that if a subscriber is only able to use interactive television service functions if it subscribes to an ISP chosen by or affiliated with the cable operator or its affiliated content provider, that subscriber will almost certainly not subscribe to the services of any other ISP. Under this scenario, the more successful and ubiquitous interactive television services become, the greater is the threat to a competitive market for Internet access services unless the Commission makes it plain from the outset that interactive television services must be offered in a manner that prevents discrimination using the information transmission path through which those services are provided.

The rules necessary to maintain simultaneously a competitive Internet access market and a regulatory regime that encourages the deployment of interactive television services would have to extend beyond the simple ability of subscribers to be able to choose the ISP through which television-related

information services are delivered. In addition, those rules must require that interactive television service components (be they triggers, ITV-STBs, or network hardware or software) be configured so that they do not disadvantage non-affiliated ISPs by, for example, slowing transmission speeds when subscribers use a non-affiliated ISP, causing delays in accessing non-affiliated content, or re-designating the subscriber's chosen ISP.

IV. CONCLUSION

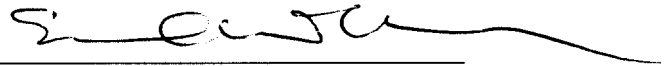
The Commission's Inquiry regarding interactive television services is both timely and appropriate. As the Commission considers what actions to take with respect to these services, EarthLink urges the Commission to recognize that the Communications Act and the Commission's existing rules already provide a solid regulatory framework for addressing potential issues of discrimination that may arise in the context of interactive television services. In particular, it is well established that carriers may provide bundled services whose component parts fall under more than one title of the Act. The fact that such bundled services may implicate multiple titles of the Act, however, neither compels nor makes appropriate the fashioning of a new regulatory regime. To the contrary, in the interest of regulatory certainty and consistency with the mandates of the Communications Act, the Commission should apply to interactive television services a regulatory approach that recognizes the different status under the Act of the various building blocks of ITV service.

In particular, by recognizing that certain portions of these building blocks fall clearly under title VI of the Act, the Commission may avoid running afoul of the statutory limitations on its authority to regulate cable services. By

the same token, by recognizing that the transmission function that underlies every information service offered to the public for a fee falls squarely under the Commission's title II jurisdiction, the Commission will find that it has ample authority to ensure that cable operators that choose to offer interactive television services may not leverage their protected market position with respect to cable services into an unfair advantage in the information services and telecommunications services markets.

As EarthLink stated at the outset of its comments, prompt resolution of the issues raised in the *Cable Open Access NOI* is a critical first step to establishing the legal regime applicable to interactive television services. EarthLink urges the Commission to address those issues immediately.

Respectfully submitted,



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